

1 DAVID R. ZARO (BAR NO. 124334)
2 RYAN T. WAGGONER (BAR NO. 251694)
3 ALLEN MATKINS LECK GAMBLE
4 MALLORY & NATSIS LLP
5 151 South Figueroa Street, Ninth Floor
Los Angeles, California 90071-3309
Phone: (213) 622-5555
Fax: (213) 620-8816
E-Mail: dzaro@allenmatkins.com
rweggoner@allenmatkins.com

Attorneys for Defendant
ONEWEST BANK, FSB

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
AT SAN DIEGO

12 DIANE BEALL fka TEMPLIN,
13 Plaintiff,
14 vs.
15 QUALITY LOAN SERVICE C
16 ONEWEST BANK, F.S.B.; and
DOES 1-10,
Defendants

Case No. 10-CV-1900 IEG(WVG)

**NOTICE OF MOTION AND MOTION
TO DISMISS FIRST AMENDED
COMPLAINT FOR FAILURE TO
STATE A CLAIM [FRCP 12(b)(6)]**

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

20 PLEASE TAKE NOTICE THAT on March 7, 2011, at 10:30 a.m., in
21 Courtroom 1 of the above-entitled court located at 940 Front Street, San Diego,
22 California, 92101, Defendant OneWest Bank, F.S.B. ("OneWest") will and hereby
23 does move the Court for an order granting its motion to dismiss Plaintiff's First
24 Amended Complaint ("FAC") pursuant to Federal Rule of Civil Procedure 12(b)(6)
25 because Plaintiff's FAC fails to state a claim upon which relief can be granted. In
26 the alternative, OneWest moves the Court for an order dismissing the First through
27 Tenth Claims for Relief contained in the FAC, and each of them, pursuant to Federal
28 Rule of Civil Procedure 12(b)(6), because the First through Tenth Claims for Relief,

1 and each of them, fail to state a claim upon which relief can be granted, as further
 2 described below.

3 **First Claim for Relief**

4 The First Claim for relief, for wrongful foreclosure, fails to state a claim upon
 5 which relief can be granted because Plaintiff failed to allege her ability and
 6 willingness to tender the proceeds due under her mortgage loan.

7 **Second Claim for Relief**

8 The Second Claim for Relief, for quiet title, fails to state a claim upon which
 9 relief can be granted because Plaintiff has not discharged her debt.

10 **Third Claim for Relief**

11 The Third Claim for Relief, for violation of Real Estate Settlement
 12 Procedures Act ("RESPA"), fails to state a claim upon which relief can be granted
 13 because Plaintiff's claims are barred by the statute of limitations and OneWest did
 14 not participate in the loan-origination process.

15 **Fourth Claim for Relief**

16 The Fourth Claim for Relief, for fraud, fails to state a claim upon which relief
 17 can be granted because the claim is barred by the statute of limitations, the claim is
 18 not alleged with the required specificity and Plaintiff fails to allege that OneWest
 19 misrepresented any fact.

20 **Fifth Claim for Relief**

21 The Fifth Claim for Relief, for violation of California Business & Professions
 22 Code section 17200, *et seq.*, fails to state a claim upon which relief can be granted
 23 because Section 17200 does not entitle a claimant to recovery of damages and no
 24 allegations of any violation by OneWest are alleged.

25 **Sixth Claim for Relief**

26 The Sixth Claim for Relief, for rescission, fails to state a claim upon which
 27 relief can be granted, because Plaintiff has not discharged her debt.

28

1 **Seventh Claim for Relief**

2 The Seventh Claim for Relief, for violation of Truth in Lending Act
 3 ("TILA"), fails to state a claim upon which relief can be granted because Plaintiff's
 4 claims are barred by the statute of limitations and Plaintiff is not entitled to
 5 rescission.

6 **Eighth Claim for Relief**

7 The Eighth Claim for Relief, for violation of the Civil Code section 2923.5, is
 8 barred by the doctrine of *res judicata* because this Court previously dismissed this
 9 claim with prejudice.

10 **Ninth Claim for Relief**

11 The Ninth Claim for Relief, for injunctive relief, is barred by the doctrine of
 12 *res judicata* because this Court previously dismissed this claim with prejudice.

13 **Tenth Claim for Relief**

14 The Tenth Claim for Relief, for accounting, fails to state a claim upon which
 15 relief can be granted because Plaintiff does not allege some balance is due to her.

16 This motion is based upon this Notice of Motion and Motion, the
 17 Memorandum of Points and Authorities submitted herewith, the complete files and
 18 records of this action, and such additional evidence and arguments as may be
 19 presented at or before the time of the hearing on this motion.

20
 21 Dated: January 24, 2011

ALLEN MATKINS LECK GAMBLE
 MALLORY & NATSIS LLP
 RYAN T. WAGGONER
 DAVID R. ZARO

22
 23 By: /s/ Ryan T. Waggoner
 24 RYAN T. WAGGONER
 25 Attorneys for Defendant
 26 ONEWEST BANK, FSB

PROOF OF SERVICE

I am employed in the County of Los Angeles, State of California. I am over the age of eighteen (18) and not a party to this action. My business address is 515 South Figueroa Street, Ninth Floor, Los Angeles, California 90071-3309.

On January 24, 2011, I served the within document(s) described as:

**NOTICE OF MOTION AND MOTION TO DISMISS FIRST
AMENDED COMPLAINT FOR FAILURE TO STATE A CLAIM
[FRCP 12(b)(6)]**

with the Clerk of the Court using the CM/ECF system which will send notification of such filing to:

Diane Beall, Esq.
Advocates Law & Real Estate
243 South Escondido Blvd., Suite 125
Escondido, CA 92025-4116

Plaintiff
T: (760)807-5417
E: attorneydianebeall@gmail.com

Renee Reyes De Golier, Esq.
McCarthy & Holtus, LLP
1770 Fourth Avenue
San Diego, CA 92101-2607

Counsel for Quality Loan Service Corp.
T: (619) 685-4800 – F: (619) 685-4811
E: rdego@mcCarthyholthus.com

- COURTESY COPY BY MAIL:** I placed a true copy of the document in a sealed envelope or package addressed as indicated above in Los Angeles, California for collection and mailing pursuant to the firm's ordinary business practice. I am familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.
 - COURTESY COPY BY DIRECT E-MAIL:** I caused a true copy of the document to be sent to the persons at the corresponding electronic address as indicated above from fkalve@allenmatkins.com. I am readily familiar with this firm's Microsoft Outlook electronic mail system and did not receive an electronic message or other indication that the transmission was unsuccessful.

I declare under penalty of perjury that I am employed in the office of a member of the bar of this Court at whose direction the service was made and that the foregoing is true and correct.

Executed on January 24, 2011, at Los Angeles, California.

Frederick Kalve
(Type or print name)

(Signature of Declarant)